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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DAVID R. MCCONATHY et al.,

Plaintiffs,

vs.

GATEWAY BUSINESS BANK et al.,

Defendants.

3:09-cv-00665-RCJ-VPC

ORDER

This case arises out the foreclosure of Plaintiffs' mortgage. Pending before the Court are four motions: two motions to stay, a motion to remand, and a motion to amend. For the reasons given herein, the Court denies the motions.

I. FACTS AND PROCEDURAL HISTORY

On June 10, 2005, Plaintiffs David and Lynn McConathy gave lender Gateway Business Bank, d.b.a. Mission Hills Mortgage Bankers ("Mission Hills") a promissory note in the amount of \$359,500 to purchase real property located at 1635 Cricketwood Cir., Reno, NV 89523 ("the Property"), secured by a deed of trust ("DOT") against the Property. (See Compl. ¶ 42, ECF No. 1-1; DOT 1-3, June 10, 2005, ECF No. 1-3). The trustee on the DOT is First American Title Co. of Nevada ("First American"). (See DOT 1).

On June 4, 2009, an employee of LSI Title Co., as agent for Regional Trustee Service Corp. ("Regional Trustee"), at the command of Everhome Mortgage Co., recorded a notice of default and election to sell ("NOD") in Washoe County. (See NOD, June 4, 2009, ECF No. 1-3). There is no indication in the record that any of these agencies had been previously substituted as

1 trustee for First American, or that Mission Hills or First American as beneficiary and trustee,
2 respectively, caused any of the entities listed on the NOD to record it. This indicates a statutory
3 defect in foreclosure that would support an injunction against sale unless and until cured. *See*
4 Nev. Rev. Stat. § 107.080(2)(c). On September 11, 2009, Regional Trustee filed a notice of
5 trustee's sale ("NOS") setting sale for September 30, 2009. (*See* NOS, Sept. 11, 2009, ECF No.
6 1-3). No motions to dismiss are currently pending.

7 On September 30, 2009, Plaintiffs sued Defendants Mission Hills; Mortgage Electronic
8 Registration Systems, Inc. ("MERS"), First American; Regional Trustee; Michelle Runward; and
9 Jenny Woodward in state court, asserting fourteen causes of action. Defendants removed. The
10 case was transferred to Case No. 2:09-md-02119-JAT in the District of Arizona, and this Court
11 stayed the case pending remand. In accordance with the Judicial Panel on Multidistrict
12 Litigation's partial remand order, Judge Teilborg has determined that the first cause of action and
13 part of the third, fourth, and tenth through twelfth causes of action (insofar as they do not concern
14 MERS) have been remanded to this Court. (*See* Am. Order 8:16-17, June 4, 2010, ECF No. 24).
15 The Court may therefore rule on the following causes of action without a risk of inconsistent
16 rulings by the MDL court: (1) Unfair Lending Practices Under Nevada Revised Statutes ("NRS")
17 Section 589D.100; (3) Injunctive Relief; (4) Declaratory Relief; (10) Civil Conspiracy; (11)
18 Racketeering Under NRS Section 207.470; and (12) Unjust Enrichment.

19 **II. LEGAL STANDARDS**

20 Federal courts are courts of limited jurisdiction, possessing only those powers granted by
21 the Constitution and statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008)
22 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The party
23 asserting federal jurisdiction bears the burden of overcoming the presumption against it.
24 *Kokkonen*, 511 U.S. at 377. Federal Rule of Civil Procedure 12(b)(1) provides an affirmative
25 defense for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Additionally, a court

1 may raise the question of subject matter jurisdiction sua sponte at any time during an action.
2 *United States v. Moreno-Morillo*, 334 F.3d 819, 830 (9th Cir. 2003). Regardless of who raises
3 the issue, “when a federal court concludes that it lacks subject-matter jurisdiction, the court must
4 dismiss the complaint in its entirety.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citing
5 16 J. Moore et al., *Moore’s Federal Practice* § 106.66[1], pp. 106-88 to 106-89 (3d ed. 2005)).

6 A district court’s jurisdiction extends to cases removed from state court under particular
7 circumstances. 28 U.S.C. § 1441(b) (“Any civil action of which the district courts have original
8 jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the
9 United States shall be removable without regard to the citizenship or residence of the parties.
10 Any other such action shall be removable only if none of the parties in interest properly joined
11 and served as defendants is a citizen of the State in which such action is brought.”). In cases
12 removed from state court, a federal court later finding a lack of subject matter jurisdiction does
13 not dismiss, but must remand to state court. 28 U.S.C. § 1447(c). A decision to remand a case
14 removed on any other basis than civil rights removal jurisdiction under 28 U.S.C. § 1443 “is not
15 reviewable on appeal or otherwise.” 28 U.S.C. § 1447(d).

16 A defect in removal exists where jurisdiction is predicated purely on diversity and one or
17 more defendants is a citizen of the forum state. *See* § 1441(b). This is the “forum defendant”
18 rule. However, the citizenship of a defendant who has been fraudulently joined is discounted.
19 *Ritchie v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Where fraudulent joinder is
20 alleged, a court does not take the allegations of citizenship in the complaint as true but permits
21 the defendant seeking removal to present facts showing fraudulent joinder. *See id.* “Joinder is
22 fraudulent [i]f the plaintiff fails to state a cause of action against a resident defendant, and the
23 failure is obvious according to the settled rules of the state.” *Hunter v. Philip Morris USA*, 582
24 F.3d 1039, 1043 (9th Cir. 2009) (citations and internal quotation marks omitted) (alteration in
25 original).

1 **III. ANALYSIS**

2 **A. Motions to Remand and to Stay**

3 The Court denies the motion to remand. Plaintiffs have sued two non-diverse, forum-
4 resident Defendants: Runward and Woodward (collectively, "the Individual Defendants"). The
5 Individual Defendants are fraudulently joined, however, and their joinder therefore does not
6 defeat diversity.

7 An agent is personally liable to third parties for his own torts, regardless of whether he is
8 acting on behalf of a corporate principal within the scope of his employment, but unless the agent
9 and the third party agree, the agent is not liable on contracts entered into by the agent on behalf of
10 the principal where the principal is disclosed. *See* Restatement (Third) of Agency § 7.01 & cmt. b
11 (2006). Agents in Nevada can be personally liable in tort for misrepresentations they make to
12 third parties. *See Nev-Tex Oil & Gas v. Precision Rolled Prods.*, 782 P.2d 1311, 1311 (Nev.
13 1989) (citing *Carrell v. Lux*, 420 P.2d 564, 576 (Ariz. 1966); *Pentecost v. Harward*, 699 P.2d
14 696, 699 (Utah 1985)). Although the Nevada Supreme Court has not directly ruled on the
15 question, the states appear to be in agreement that an agent cannot be liable on a contract entered
16 into on behalf of a principal where the agent has disclosed the principal. *See, e.g., Eppler, Guerin*
17 *& Turner, Inc. v. Kasmir*, 685 S.W.2d 737, 738 (Tex. 1985); *Rathbon v. Budlong*, 15 Johns. 1,
18 2-3 (N.Y. 1818) (holding that an employee of a company could not be not liable in contract for
19 actions taken on behalf of corporation).

20 The Individual Defendants cannot be liable in contract here, because they are alleged only
21 to have acted in their capacity as agents for the institutional Defendants. The Individual
22 Defendants are alleged to have "participated and encouraged Plaintiff(s) to enter into said loans
23 and purchase." (Compl. ¶ 35). This is not enough to state a tort claim against them under *Iqbal*
24 and *Twombly* because it is not a tort to "encourage[another] to enter into . . . loans and
25 purchase[s]." (*See id.*). There are no factual allegations indicating how they are liable for any tort

1 due to this activity. It is consistent with the Complaint that the Individual Defendants merely
2 handed papers to Plaintiffs to sign, without even knowing much about what was in them or
3 having any intent to defraud. It is also consistent with such a complaint that they merely printed
4 copies of the documents or performed some other innocuous task touching upon the documents
5 that would not possibly give rise to tort liability.

6 The Court finds that the Individual Defendants are fraudulently joined and denies the
7 motion to remand. Even if remand were otherwise appropriate, part of the case is still pending in
8 the MDL case in the District of Arizona, and a remand order applying only to certain causes of
9 action in the case would be a procedural catastrophe.

10 **B. Motions to Stay**

11 In November 2009, Plaintiffs moved to stay pending determination of the present motion
12 to remand. This motion is now moot, because the motion to remand has been fully briefed and is
13 being contemporaneously decided. In January 2010, MERS filed its own motion to stay pending
14 a decision on transfer by the Judicial Panel on Multidistrict Litigation. This motion is also now
15 moot, because the case has been transferred to the District of Arizona, Case. No. 2:09-md-02119-
16 JAT, and partially remanded back to this Court. The Court denies both motions to stay as moot.

17 **C. Motion to Amend**

18 Plaintiffs move to file a first amended complaint to remove any possible vestige of
19 federal question jurisdiction and to further specify the alleged wrongful conduct of Defendants.
20 The motion was filed on June 7, 2010, approximately nine months after the Complaint was filed.
21 MERS has filed a notice of non-opposition, but Regional Trustee has filed an opposition. The
22 proposed first amended complaint both adds and rearranges causes of action in a way that would
23 likely nullify Judge Teilborg's carefully considered partial remand order if permitted, at least in
24 part, and which would require his consideration of the new causes of action. It would be a
25 tremendous waste of judicial resources to permit such an amendment at this stage of the

1 litigation, because it would require Judge Teilborg to reconsider his partial remand of the new
2 and newly arranged causes of action, which it took him several months to determine the first
3 time. Plaintiffs have waited too long after the twenty-one-day permissive amendment deadline to
4 request such an amendment. Moreover, an amendment would not aid Plaintiffs in their quest to
5 obtain a remand, because federal jurisdiction is determined according to the circumstances
6 existing at the time a case is removed, notwithstanding later amendments to a complaint. *See Atl.*
7 *Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, No. 09-35716, 2010 WL 3435378, at *7 (9th Cir. Sept.
8 2, 2010).

9 Finally, the Court notes that even if Judge Teilborg has granted a motion to amend in this
10 case or others that are part of MDL Case No. 2:09-md-02119-JAT, such an order can only apply
11 to those causes of action remaining with Judge Teilborg and does not necessarily affect this
12 Court's analysis of whether to permit amendment with respect to the claims pending before this
13 Court. The District of Arizona has no jurisdiction over the causes of action remanded to this
14 Court by the JPML, just as this Court has no jurisdiction over those causes of action not
15 remanded. Both this Court and the Arizona court lack the ability to grant a motion to amend a
16 complaint in its entirety in any case where pretrial jurisdiction is split between them. In such
17 cases, the respective courts have the power only to grant a motion to amend in part, i.e., with
18 respect to the claims before it. This Court has deferred to Judge Teilborg's determinations of
19 which causes of action have been remanded to this Court and which causes of action remain with
20 him. But the Court has deferred to him for the practical purpose of avoiding competing rulings
21 over the same causes of action, not because his determination is binding. It is possible this Court
22 could disagree with Judge Teilborg over which causes of action the JPML has remanded in a
23 particular case, because the JPML has given broad, nonspecific guidance in this regard and has
24 not even indicated whether the transferor or transferee court is to make such determinations.
25 Nevertheless, it is the JPML that has separated and remanded certain causes of action back to this

1 Court, not Judge Teilborg. Unless and until the JPML gives more specific guidance, this Court
2 will continue to defer to Judge Teilborg's determinations of which claims have been remanded in
3 order to avoid the procedural disaster that would befall these cases in the face of competing
4 rulings.

5 **CONCLUSION**

6 IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 6) is DENIED.

7 IT IS FURTHER ORDERED that the Motions to Stay (ECF Nos. 7, 17) are DENIED as
8 moot.

9 IT IS FURTHER ORDERED that the Motion to Amend (ECF No. 24) is DENIED.

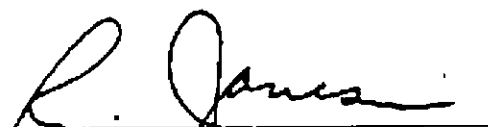
10 IT IS FURTHER ORDERED that Defendants will cease foreclosure proceedings for one-
11 hundred (100) days. During this period, Plaintiffs will make full, regular monthly payments
12 under the note every thirty (30) days, with the first payment due fifteen (15) days after the date of
13 this order. Plaintiffs need not pay late fees or cure the entire amount of past default at this time.
14 Failure to make monthly payments during the injunction period, however, will result in a lifting
15 of the injunction.

16 IT IS FURTHER ORDERED that during the injunction period Defendants will conduct a
17 private mediation with Plaintiffs in good faith. This means the beneficiary must send a
18 representative to the mediation who has actual authority to modify the note, although actual
19 modification is not required.

20 IT IS FURTHER ORDERED that Plaintiffs will provide requested information to
21 Defendants in advance of the mediation in good faith.

22 IT IS SO ORDERED.

23 Dated: December 28, 2010

24 
25 United States District Judge